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No. 88-1081

In the Supreme Court of the United States

OCTOBER TERM, 1988

PERLIE DONALD WORKMAN AND
JEFFREY WORKMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the hearsay statement of an unavailable witness was properly admitted under Fed. R. Evid. 804(b)(5) and the Confrontation Clause.

2. Whether the evidence was sufficient to sustain petitioner Perlie Workman's conviction for threatening a witness, in violation of 18 U.S.C. 1512(b)(1) (1982 & Supp. IV 1986).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 860 F.2d 140.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1988. The petition for a writ of certiorari was filed on December 27, 1988 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, each petitioner was convicted of receipt of stolen property in interstate

commerce, in violation of 18 U.S.C. 659. In addition, petitioner Perlie Workman was convicted of threatening a witness with intent to influence his testimony in an official proceeding, in violation of 18 U.S.C. 1512(b)(1) (1982 & Supp. IV 1986). Perlie Workman was sentenced to nine years' imprisonment and an $8,000 fine. Jeffrey Workman was sentenced to a suspended term of four years' imprisonment, five years' probation, and a $2,500 fine.

1. The evidence at trial showed that in July 1986, Ronald Wilson, a professional truck driver, received a shipment of 1,068 cases of liquor for delivery to a company in Texas. Wilson, who was in debt, decided to steal the shipment and sell it. He called his cousin, Terry Davis, and asked him to find a buyer for the liquor. Between July 25 and 26, six telephone calls were placed between Davis's residence and petitioners' residence. Pet. App. A2-A3.

Davis told Wilson to bring the shipment to a motel in Icard, North Carolina. Wilson then accompanied Davis to petitioners' home, where Davis told Jeffrey Workman that they had a shipment of liquor for sale. Jeffrey stated that he would contact them after Perlie Workman returned home. After Davis and Wilson made an unsuccessful attempt to sell the liquor elsewhere, Davis returned to petitioners' residence and offered the shipment to Perlie, who responded that he did not want the liquor but would contact someone who might be interested. Between July 26 and 27, three telephone calls were placed from petitioners' residence to numbers listed to James Norman in South Carolina. Pet. App. A3-A4.

On July 26, Jeffrey advised Davis that he and Perlie would buy the liquor for $7,000 and instructed Davis to come, without Wilson, to deliver the liquor. After telling Wilson about the offer and confirming the price with Perlie at Wilson's direction, Davis delivered the liquor to petitioners' residence and received $7,000 from Perlie.

Petitioners, Davis, and two other men unloaded the liquor from the truck and placed it in a nearby building. Davis then met Wilson at a convenience store and gave him the $7,000. Wilson paid Davis $500 for arranging the sale. Two months later, 422 cases of stolen liquor were found on James Norman's South Carolina farm. Pet. App. A4-A5.

In January 1987, a federal grand jury returned a three-count indictment against Perlie Workman, Davis, and Wilson for the theft and sale of the liquor. In April 1987, Perlie, without explanation, gave $3,000 in cash to Davis's father and asked that he give it to Davis. After checking with Davis, Davis's father returned the money to Perlie. At that time, Perlie told Davis's father that, although he knew he should not, he wanted to talk to Davis. Pet. App. A5-A6.

Thereafter, Davis agreed to plead guilty to one count of the indictment and to cooperate with the government. On May 12, 1987, Davis and his attorney met with an FBI agent. In a tape-recorded statement that implicated petitioners and Wilson, Davis confessed his role in the sale of the stolen liquor. Pet. App. A6-A7.

On June 10, 1987, Perlie asked Davis to meet with him. Davis contacted the FBI agent, who fitted him with a hidden tape recorder and transmitter, and then met with Perlie in Perlie's car outside a convenience store. Davis told Perlie that Jeffrey would probably be indicted. Davis said that he would have to tell the truth, and that he was scared. The following exchange took place:

> Perlie: "scared, hell, scared of what? You're in fact * * * you know what you are going to get? I'm gonna show you what you gonna get."
>
> Davis: (shouts) "no you don't Perl."

> Davis: (as he exited from Perlie's car): "Oh Lord! (pause) I've got to leave here."
>
> Perlie: "Terry, you better get here."

After Davis fled, the FBI agent arrested Perlie Workman. Pet. App. A8-A9.

Two weeks before trial, Davis died of hepatitis. The government then notified petitioners that it intended to introduce Davis's statement into evidence at trial. The district court admitted the statement, and a jury convicted petitioners. Petitioners challenged their convictions, contending that the district court's admission into evidence of Davis's recorded statement violated their Sixth Amendment right to confrontation and was improper under Fed. R. Evid. 804(b)(5). Perlie Workman also asserted that there was insufficient evidence to convict him on the Section 1512(b)(1) charge.

2. The court of appeals affirmed. Pet. App. A1-A27. The court held (Pet. App. A15) that Davis's statement had been properly admitted under Fed. R. Evid. 804(b)(5) because it bore sufficient "circumstantial guarantees of trustworthiness" to ensure its reliability. First, Davis had given his statement voluntarily in the presence of his attorney and the attorney had insisted upon and made the recording. Pet. App. A14-A15. Second, Davis's subsequent agreement to meet Perlie while wearing a tape recorder supplied by the FBI "demonstrated his conviction that his statement was true, and that a recorded meeting with Perlie Workman would support, and not contradict, his statement." Pet. App. A16-A17. Third, Davis's statement qualified as a statement against interest by an unavailable declarant under Fed. R. Evid. 804(b)(3). Pet. App. A17-A18. Fourth, Davis's statement was corroborated by other evidence at trial, including the evidence of the phone calls from Davis's residence to petitioners' resi-

dence; the calls from petitioners' residence to Norman, and the subsequent discovery of a large quantity of stolen liquor at Norman's farm; trial testimony by Wilson that he had observed his truck parked across from petitioners' residence; and Perlie Workman's attempt to give Davis money and his subsequent threats against Davis. Pet. App. A23-A24. The court concluded (Pet. App. A14-A15) that the same circumstances that demonstrated the trustworthiness of Davis's statement for purposes of Fed. R. Evid. 804(b)(5) provided "adequate indicia of reliability" to ensure that the use of an out-of-court statement made by an unavailable declarant did not violate the petitioners' Sixth Amendment right to confront the witnesses against them.

The court also concluded that Perlie Workman's statement, "you know what you're gonna get? I'm gonna show you what you gonna get," when considered in light of the surrounding circumstances, was sufficient to sustain Perlie Workman's conviction for threatening Davis. Pet. App. A24-A27.

ARGUMENT

1. Petitioners contend (Pet. 8-9) that the court of appeals erred in upholding the admission of Davis's statement into evidence under Fed. R. Evid. 804(b)(5) and the Confrontation Clause. The court of appeals correctly determined on the facts of this case that the requirements of both Fed. R. Evid. 804(b)(5) and the Confrontation Clause were met. That ruling is correct and does not warrant further review.

Rule 804(b)(5) authorizes the admission of an unavailable witness's hearsay statement not covered by a specific hearsay exception if the statement has "equivalent circum-

stantial guarantees of trustworthiness."[1] The Confrontation Clause similarly requires that hearsay evidence of an unavailable witness bear "adequate 'indicia of reliability' " to assure that it does not offend a defendant's right to confront and cross-examine the witnesses against him. *Ohio* v. *Roberts,* 448 U.S. 56, 66 (1980). For purposes of the Confrontation Clause, such reliability "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Ibid.*[2] Where, as here, the evidence does not fall within a firmly rooted hearsay exception, and is thus "presumptively unreliable," it may nonetheless meet Confrontation Clause reliability standards "if it is supported by a 'showing of particularized guarantees of trustworthiness.' " *Lee* v. *Illinois,* 476 U.S. 530, 543 (1986) (quoting *Roberts,* 448 U.S. at 66). Evidence found admissible after such a showing may include the confes-

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[1] Petitioners do not dispute that the evidence at issue in this case met the other requirements for admission under Fed. R. Evid. 804(b)(5). Those requirements, which the court of appeals found satisfied (Pet. App. A10, A19-A23), are that:

> * * * (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

[2] Contrary to petitioners' contentions (Pet. 22-24), the court of appeals cited *Bourjaily* v. *United States,* 483 U.S. 171 (1987), for no more than this proposition. See Pet. App. A14. The court recognized (*ibid.*) that the principle did not apply here, where the statement was admitted into evidence under Fed. R. Evid. 804(b)(5).

sion of an unavailable co-defendant. *Lee* v. *Illinois*, 476 U.S. at 545.[3]

The court of appeals reviewed the record and determined that the district court did not err by admitting Davis's statement, because a number of circumstances lent Davis's statement "a high degree of reliability and trustworthiness." Pet. App. A19 (quoting *United States* v. *West*, 574 F.2d 1131 (4th Cir. 1978)). The court of appeals concluded that those "guarantees of trustworthiness" were sufficient to satisfy the requirements of both Fed. R. Evid. 804(b)(5) and the Confrontation Clause. See, *e.g.*, *United States* v. *Woolbright*, 831 F.2d 1390, 1396-1397 (8th Cir. 1987) (indicia of reliability satisfying Fed. R. Evid. 804(b)(5) also satisfied Confrontation Clause requirements); *United States* v. *Barlow*, 693 U.S. 954, 964-965 (6th Cir. 1982) (same), cert. denied, 461 U.S. 945 (1983); 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 800[04], at 800-35 (1988) (compliance with Article VIII of Federal Rules of Evidence should constitute compliance with Confrontation Clause requirements). That conclusion is well supported by the record.[4]

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[3] Although the Court in *Lee* v. *Illinois* held that the admission of the accomplice's out-of-court statement in the circumstances of that case violated the Confrontation Clause, the Court recognized that such statements would not be barred if they bore sufficient guarantees of trustworthiness. See also *New Mexico* v. *Earnest*, 477 U.S. 648, 649-650 (1986) (Rehnquist, J., concurring).

[4] Contrary to petitioners' contention (Pet. 20), the court of appeals correctly determined that *Bruton* v. *United States*, 391 U.S. 123 (1968), is not relevant to this case. *Bruton* concerned the admission into evidence of a non-testifying co-defendant's confession at a joint trial where the confession was not admissible against the defendant under any exception to the hearsay rule. The issue in *Bruton* was whether a limiting instruction directing the jury not to consider the confession against the defendant was sufficient to prevent any prejudice to the defendant from the admission of the statement, which

First, Davis gave his statement voluntarily, in the presence of his attorney. There was no doubt about the identity of the voices on the tape-recording of the statement, and both the agent who took the statement and Davis's attorney testified concerning the circumstances under which it was made. Pet. App. A15-A16.

Second, after giving the statement, Davis agreed to wear a tape recorder while meeting with Perlie, which "demonstrated his conviction that his statement was true, and that a recorded meeting with Perlie Workman would support, and not contradict, his statement." Pet. App. 16-17. See *United States* v. *West,* 574 F.2d 1131, 1135 (4th Cir. 1978) (declarant's willingness to obtain recorded statements from defendants showed that his statements were reliable).

Davis's statement was also corroborated by evidence at trial. Perlie's attempt to bribe Davis before Davis ever contacted the FBI to give his statement constituted an implied admission of guilt by Perlie as well as his knowledge that Davis was in a position to implicate Perlie. Pet. App. A24. At trial, Wilson's testimony about the crime was entirely consistent with Davis's statement. Wilson's testimony corroborated Davis's statement in general, and it directly implicated petitioners, because Wilson testified that after Davis made a telephone call from the motel, Davis drove Wilson's truck to a location across the street from petitioners' home. Three or four hours later, according to Wilson's testimony, Davis returned the truck to Wilson

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was otherwise highly inculpatory. In *Bruton*, it was undisputed that the co-defendant's confession was inadmissible against the defendant; the only issue before the Court was whether the instruction to the jury was sufficient to protect the defendant from the risk that the jury would make improper use of the confession. In this case, by contrast, the issue is whether the statement in question was fully admissible under the hearsay rules and the Confrontation Clause so that it could be admitted into evidence without any limitations on its use against any of the defendants. See *Lee* v. *Illinois*, 476 U.S. at 542.

and gave Wilson $6,000 in cash. C.A. App. 86-97. Finally, the telephone company records introduced into evidence showed that between July 25 and 27, six telephone calls were placed between Davis's residence and petitioners' residence, and three calls were placed from petitioners' residence to Norman. All of that evidence, taken together,[5] demonstrated that Davis's statement had the "particularized guarantees of trustworthiness" that the Confrontation Clause requires, and the "circumstantial guarantees of trustworthiness" equivalent to those characterizing the specific exceptions to the hearsay rules that Fed. R. Evid. 804(b)(5) requires.[6]

2. Perlie Workman contends (Pet. 29-35) that the evidence was insufficent to sustain his conviction for threatening a witness, in violation of 18 U.S.C. 1512(b)(1) (1982 & Supp. IV 1986). He maintains that his remarks to Davis

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[5] Petitioners contend (Pet. 20) that Davis's statement was unreliable because Wilson stated in a letter he wrote while he was in prison that Davis was lying when he stated that petitioners "bought the stuff," because "some guy in S.C. bought it." Pet. App. A28. Wilson's letter is not entitled to weight because Wilson was not present at the sale made by Davis. In any event, the letter does not contradict Davis's statement because Davis stated merely that Perlie sought to buy the liquor for a third party; he did not suggest that petitioners sought to buy the liquor for themselves. In fact, by confirming that "some guy in S.C." brought the liquor, Wilson's letter supported the government's theory that the liquor was ultimately sold to Norman.

[6] Petitioners incorrectly contend (Pet. 24-25) that the court of appeals erred by admitting Davis's statement under the hearsay exception for statements against interest by unavailable declarants, Fed. R. Evid. 804(b)(3). The court of appeals did observe (Pet. App. A16) that Davis's statement was against his penal interest, but the court did not separately uphold the admission of the statement under Rule 804(b)(3). This case therefore does not present the question whether Davis's statement would have been admissible under Rule 804(b)(3) even though it was made to law enforcement officers after Davis's arrest.

were ambiguous and did not constitute a threat. This fact-bound issue merits no further review.

Perlie's statement that he was going to "show [Davis] what [he was] gonna get," after Davis had informed him that petitioners were about to be indicted and that Davis would have to testify truthfully against them, was sufficiently intimidating to constitute a threat within the meaning of Section 1512(b)(1). See *United States* v. *Grey Bear*, 828 F.2d 1286, 1297 (8th Cir. 1987) (remark that witness would "get the same thing" as beaten victim if he spoke up supported conviction for witness tampering); *United States* v. *Capo*, 791 F.2d 1054, 1069-1070 (2d Cir. 1986) (advice that there would be no problem if everyone kept silent, together with references to membership in the "mob" and the name of a brother of a well-known crime figure were sufficient to constitute a threat).[7]

Furthermore, Davis's frightened reaction to Perlie's remarks and his sudden and hurried exit from the car demonstrated that Perlie's remarks had been intimidating.

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[7] Relying on *Massiah* v. *United States*, 377 U.S. 201 (1964), Perlie contends (Pet. 33-34) that his Sixth Amendment right to counsel was violated when the police obtained his recorded statement to "get" Davis while he was under indictment on charges relating to the theft and sale of liquor shipment. There is no merit to this claim. In the first place, Perlie has waived this claim because he did not raise the issue at trial. Second, *Massiah* does not apply to statements that relate to crimes for which the right to counsel has not attached. See *Kuhlmann* v. *Wilson*, 477 U.S. 436, 458 n.21 (1986); *Maine* v. *Moulton*, 474 U.S. 159, 180 n.16 (1985). Perlie had no right to counsel on the charge of witness tampering at the time he uttered his threat, because he was not yet charged with that crime; indeed, Perlie did not even commit the crime of witness tampering until the encounter in which Perlie claims he should have been afforded the assistance of counsel. Thus, there was no violation of his right to counsel on the witness tampering charge.

See *United States* v. *Wilson*, 796 F.2d 55, 58 (4th Cir. 1986) (witness's adverse reaction to defendant's remarks showed that the defendant intended to harass the witness), cert. denied, 479 U.S. 1039 (1987).

Finally, the circumstances leading up to the meeting between Perlie and Davis strongly indicate that Perlie was attempting to induce Davis not to reveal Perlie's role in the crime. Shortly after Perlie, Davis, and Wilson were indicted, Perlie tried to give $3,000 to Davis without explanation. Perlie subsequently told Davis's father that he wanted to meet with Davis, although he knew he should not do so. Two months later, Perlie asked Davis to meet with him. It was at that meeting, when Davis said that he would have to tell the truth, that Perlie made the comments that were alleged to constitute a threat to Davis. In light of Perlie's course of conduct leading up to the meeting and at the meeting itself, the jury could properly conclude that Perlie intended his comments to be taken as a threat and that he was trying to influence Davis's testimony in the proceedings against him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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